February 12, 2003

Via Electronic Filing

Honorable Michael K. Powell, Chairman
Honorable Kathleen Abernathy, Commissioner
Honorable Jonathan Adelstein, Commissioner
Honorable Michael Copps, Commissioner
Honorable Kevin Martin, Commissioner
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: ***Ex Parte***
CC Docket Nos. 01-338, 96-98, and 98-147

Chairman Powell and Commissioners:

On February 6, 2003, the National Association of Regulatory Utility Commissioners ("NARUC") proposed a set of unbundling principles and standards that warrants strong and serious consideration in this proceeding. [1] The framework articulated by NARUC is fully consistent with the D.C. Circuit's decision in *USTA*,[2] and we the undersigned 63 companies – urge the Commission to adopt this framework in the pending *Triennial Review* proceeding.

Our companies have invested billions of dollars in infrastructure, and have led the way in deploying innovative local telecommunications services to millions of consumers throughout the United States. Our business plans have been developed in reliance upon the twin promises of the 1996 Telecommunications Act and state and federal unbundling rules. State commissions have been the vanguard of our attempts to enter the local market and are the entities in by far the best position to undertake the "granular impairment" analysis required by *USTA*. The NARUC framework provides for that granularity.

NARUC articulates six principles that lie at the heart of its proposal. Of critical importance to new entrants in local telecommunications markets is the principle that all network elements that currently are made available for leasing pursuant to Section 251(c)(3) of the 1996 Act must continue to be made available until the states determine otherwise. In addition, the NARUC principles make clear that the FCC should not attempt to preempt state decisions, but instead should confirm that Congress gave states

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1 *See* Letter from David Svanda, President, NARUC, *et al.* to Chairman Powell, CC Docket Nos. 01-338, 96-98, and 98-147, filed February 6, 2003.

2 *USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA*").

the right to establish additional unbundling obligations. The final key aspect of the NARUC proposal provides that state commissions must rule on requests to remove items from the list of network elements that incumbents must provide.

NARUC's proposal would vest the fact-finding and decision-making burdens of considering whether to "delist" network elements with state commissions. In this way, the NARUC framework allows the Commission to respond appropriately to the decision of the D.C. Circuit in *USTA,* which directs the Commission to adopt an impairment standard that allows for *detailed, fact-based application of the impairment factors* rather than a uniform national rule that applies to every geographic market and customer class. The NARUC framework recognizes that the task of identifying specific unbundling needs for particular services offered by entrants to consumers in particular geographic areas is a highly-fact intensive process – a process the FCC cannot accomplish in this (or indeed, any other) general, national rule-making. The NARUC framework thus avoids the pitfall of implementing unbundling rules of "unvarying national scope" that the D.C. Circuit overturned in *USTA*. We believe that the framework contemplated by NARUC would help foster competitive conditions most conducive to continued entry, investment and vibrant competition.

At bottom, the NARUC framework will promote the continued growth and expansion of local competition by ensuring that innovative local telecommunications services are available to all consumers – including mass-market residential and small business customers -- throughout the country. The framework does so by grounding the fact-specific "impairment" issues presented in the *Triennial Review* proceeding in the forums that can resolve them best. To the extent that unbundling obligations would need to be relieved in the future, that impairment analysis must take place on a market-by-market basis and, indeed, on a service-by-service basis. Since the NARUC framework recognizes the nuanced "impairment" inquiry that the law requires, we accordingly strongly urge you to follow this framework in making your final decision in the *Triennial Review* proceeding.

Sincerely,

s/ /s/

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President and Founder
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Richard Brown
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/s/

Tom Wright
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/s/

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